United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7213

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

Docket No. 75-7213

P/S

LUIS FUENTES,

Plaintiff-Appellant

-against-

ADOLPH ROHER, RICHARD LEE PRICE, JEROME GOODMAN, SAUL MILDWORN, DONALD S. BROWN, LYLE BROWN, MARTIN RUBIN,

Defendants-Appellees

and

CAROLYN KOZLOWSKY, GEORGINA HOGGARD, HENRY RAMOS, CARMEN BARRETO, JANICE WONG,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of New York

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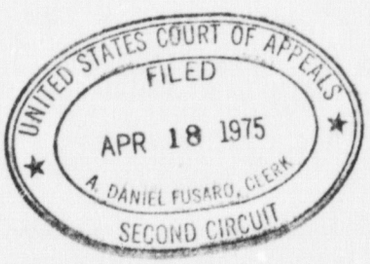

JACK JOHN OLIVERO
HERBERT TEITELBAUM
KENNETH KIMERLING
RICHARD J. HILLER
PUERTO RICAN LEGAL DEFENSE
& EDUCATION FUND, INC.
95 MADISON AVENUE
NEW YORK, NEW YORK 10016
(212) 532-8470

ATTORNEYS FOR
PLAINTIFF-APPELLANT

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STATEMENT OF THE CASE

This is an appeal from an Order of the United States District Court for the Southern District of New York (Stewart, J.) denying plaintiff's motion for a preliminary injunction and dismissing the complaint.

Plaintiff-Appellant (hereinafter plaintiff), Luis Fuentes, filed the original complaint in this action on December 21, 1973. The complaint alleges violations of plaintiff's rights under the First and Fourteenth Amendments to the Constitution of the United States as well as violations of New York State law. The gravamen of the complaint was the defendants' bringing charges and unlawfully suspending plaintiff on October16, 1973 from his position as Community Superintendent of Community School District Number One because of the exercise of his First Amendment rights to free speech and political association. The defendants were the members of the School Board of District Number One (the "Board"). Only one defendant, defendant Richard Lee Price, has filed an answer to the complaint.

The suspension of plaintiff was enjoined by the United States District for the Southern District of New York (Stewart, J.) in a companion case which challenged the election of the defendant Board because of racial and ethnic discrimination in the election process. Coalition for Education in District One v. Board of Elections, City of New York, 370 F.Supp. 42 (S.D.N.Y. 1974) aff'd., 495 F.2d 1090 (2nd Cir. 1974). The Court in Coalition ordered a new election for

all seats on the defendant Board.

After the court-ordered election in May, 1974, five defendant members of the Board, again brought charges against the plaintiff. On August 8, 1974, plaintiff was again suspended pending an administrative hearing on 41 charges brought against him.

On August 18, plaintiff moved to supplement his complaint to add the facts surrounding his recent suspension. He also sought a temporary restraining order and a preliminary injunction to reinstate him to his rightful position and to enjoin the administrative hearing against him. On September 4, 1974, the motion to supplement was granted, but the temporary restraining order was denied.

On September 27, 1974, after attending the first administrative hearing, plaintiff again moved to enjoin all further administrative hearings. On October 11, 1974 the District Court issued a temporary restraining order, enjoining the administrative hearings pending an evidentiary hearing before the Court on the questions of bias and prejudgment on the part of certain defendant Board members, who, as part of the administrative process, were to determine the veracity of the charges which they had preferred against plaintiff. The hearing was also to consider whether the administrative process was inadequate or futile and had to be exhausted. On October 21, 1974, pursuant to defendants' motion for reconsideration, the District Court reversed its Order of October 11, 1974, lifted the temporary restraining order against the administrative hearing, and mandated that it proceed.

On November 12, 1974, following evidentiary hearings, the District Court, from the bench, denied plaintiff's motion to enjoin the administrative hearings, finding that neither the hearing officer nor certain Board members were impermissibly biased and that the administrative process was constitutionally sound. Immediately thereafter, plaintiff successfully moved for reargument and reconsideration and oral argument was heard on December 2, 1974. More than three months later, on March 18, 1975, the District Court affirmed its November 12 denial of plaintiff's motion to enjoin the administrative process, and denied his motion to lift his suspension and dismiss the charges. The Court also dismissed the complaint in all respects, never reaching plaintiff's First Amendment claims. (Memorandum of March 18, 1975).

On March 19, 1975, plaintiff moved orally for reconsideration of the March 18th Order. Underlying the Court's decision was the adequacy of the administrative process, however, that process had ceased with the resignation of the hearing examiner in late January, 1975. The Court accepted new evidence on this point which demonstrated that there was no longer a necessary majority of the Board members who wanted to prosecute the charges any further, and therefore, the Board was unwilling to appoint a new hearing examiner.

On April 3, 1975, the District Court acted on this new evidence. Instead of finding the administrative process inadequate and unconstitutional, and reinstating plaintiff to his position, the

District Court issued a Memorandum and Order and directed the defendant Board members to select a hearing examiner by April 7. The Court further ordered that if they failed to appoint an examiner, the Board was to request, by April 8, that the Chancellor of the New York City School District appoint one by April 11, 1975. No such examiner, however, has been appointed. Moreover, the District Court issued another Order nunc pro tunc as of April 3, reaffirming its March 18 decision dismissing the complaint and denying injunctive relief.

On April 8, 1975 plaintiff filed a Notice of Appeal, appealing from both the Order of March 18, 1975 and the Order of April 3, 1975. On the same day, this Court granted plaintiff's motion for an expedited appeal. This Court also granted plaintiff permission to appeal on the whole record. An expedited appeal of the April 3rd Order was also granted to the five defendant members of the Board, who no longer wished to prosecute the charges against plaintiff.

STATEMENT OF FACTS

The Parties

Plaintiff is the Superintendent of Community School District Number One located on the lower east side of Manhattan. He has held that position since August 1, 1972 pursuant to a contract of employment between him and the Community School Board of District Number One dated October 31, 1972. (The contract is attached as an exhibit to the original complaint). His term of employment expires July 31, 1975.

Defendants consist of the members of the Board which contains nine seats. Plaintiff has sued those members who were elected in May 1973 and those new members elected in May 1974. Since defendants Donald S. Brown, Lyle S. Brown and Saul Mildworn were not elected in 1974, they are no longer members of the Board, and for purposes of this appeal are of no importance. Defendants Hoggard, Ramos, Barreto and Wong (the "Por Los Ninos" members) are not charged with participating in those acts and practices which form the bases of plaintiff's First and Fourteenth Amendment claims, as well as his state law claims. From the beginning, they have opposed plaintiff's suspension and the filing and prosecution of the charges against him. Accordingly, they are nominal defendants.

Defendant Kozlowsky originally voted for the suspension of plaintiff and the filing and prosecution of the charges against him. She was a member of a faction of the Board which consisted of a majority of six members in 1973 and five members in 1974. However, in or about the early part of 1975, Ms. Kozlowsky decided that the

other members of the five member majority did not share or reflect her educational philosophy, or views as to the best approach to govern the District and educate its children. As a result, she now maintains an independent position on the Board: she is neither a member of the former majority, nor the Por Los Ninos members. However, there are certain issues with which Ms. Kozlowsky and the Por Los Ninos members are in accord, one of which is their desire to reinstate plaintiff, drop the charges and in general halt his prosecution.[1]

Defendants Roher, Price, Goodman and Rubin are the other four members of the onetime five member majority faction. They are the principle defendants in this lawsuit since they were and continue to be the moving force behind the suspension, charges, and prosecution against plaintiff. They are the present Board members who plaintiff claims seek to punish him on the basis of political charges brought to achieve the ends of a political vendetta.

School Politics in District One

The plaintiff's employment as Superintendent began with the first board sworn into office after the decentralization of the New York City school system. The Board's term ran from July 1970

1. As hereinafter discussed, these five members are unable to reinstate plaintiff and drop the charges because defendant Ramos is out of State indefinitely, resulting in an insufficient number of votes to establish a majority of five at a Board meeting.

to July 1973. It was composed primarily of members of the minority community whose children total 93 percent of the children in the District One schools.

Traditionally, School Board politics in District One has been heated; the rhetoric tends to be vitriolic, often slanderous. In the May 1973 elections of the School Board, the United Federation of Teachers sponsored a slate of candidates called the Committee for Effective Education (hereinafter "CEE").[2] The CEE literature produced in 1973 contained pictures and endorsements of the principle defendants. (Pl. Ex. 5-7)[3] A review of this literature shows that plaintiff was the target of CEE. He was accused of, among other charges, being anti-semitic, anti-black, and anti-Puerto Rican. (P. Ex. 6 and 7). The CEE identified the opposition slate with plaintiff.

In May,1973,six CEE endorsed candidates, including the four principle defendants and Ms. Kozlowsky, took seats on the nine member Board. The position of these six members is best characterized by defendant Roher, himself, when he testified on October 31, 1974 at the administrative hearing of the charges:

> [Adolph Roher]...the division on the Board was extremely plain to insiders and outsiders; to the newspapers, who

2. Coalition for Education in District Number One v. Board of Elections of the City of New York, supra, 495 F.2d at 1091.

3. Reference to plaintiff's exhibits introduced into evidence shall contain the exhibit number as marked by the court below.

characterized this as "6 to 3", and even characterized this as being "pro and anti".

By Mr. Aronstein [attorney for the Board]:

Q When you say "pro and anti", what characterizations where they speaking of; pro and anti what?

A Well, usually they said pro U.F.T. or U.F.T. dominated and anti U.F.T. Sometimes it was pro Fuentes, and et cetera. Sometimes it was pro Merit, et cetera.

Q When they made reference to "pro Fuentes," were they referring to any members of the six?

A They were referring to no members of the six.

Q Were they referring to the three minority members?

A Yes.

(Roher Administrative Testimony 200-201)[4]

The "anti Fuentes" Board members include the principle defendants.

The May, 1974 elections ordered by the District Court in the Coalition case produced the same vitriolic CEE literature with the same endorsements of the principle defendants. Once again, plaintiff was the target. The outcome of the election produced a Board of five CEE endorsees; the four principle defendants and Ms. Kozlowsky.

At the hearing in the lower Court, defendants Roher and Price sought to disassociate themselves from the CEE literature. They testified that they did not see the literature before it was produced nor did they distribute the literature. However, neither defendants demanded that his name be removed from the literature (T. 192-193, 204), and both permitted CEE to use their names in 1974

4. Relevant portions of defendant Roher's testimony at the administrative hearing on October 31, 1974 is annexed to the affidavit of Herbert Teitelbaum, Esq. sworn to November 19, 1973. Hereinafter, such testimony will be designated "Roher Administrative Testimony".

after knowing the nature of the 1973 campaign literature. Moreover, testimony was offered by a CEE candidate, Hyman Silverglad, indicating that defendant Roher was sufficiently connected with CEE to participate in the selection of its 1974 slate (T.506, 510), and that the CEE endorsed candidates distributed the CEE literature (T.521, 523, 555, 559), and believed its contents to be true.[5] (T. 549-550).

---

5. The nature of the campaign literature and Roher and Price's failure to disassociate themselves from it for two consecutive years; that literature's endorsement of Roher and Price and its persistent personal attacks on plaintiff, cast serious doubt as to the credibility of Roher and Price's belated attempt to disassociate themselves from the literature before Judge Stewart (T. 192-193, 402),and the basis for Judge Stewart's finding that:

> ...Perhaps it would have been advisable for them to have completely disassociated themselves from such literature, but we cannot conclude that their failure to do so was an indication of their personal bias against Fuentes. Rather, we find it reasonable to conclude that the CEE leaflets were issued during the heat of the school board campaigns, and did not represent any personal animus toward Fuentes.
>
> (March 18, Opinion p. 32)

Thus, the District Court attributed no probative value to the campaign literature in a case in which plaintiff charges that he is being persecuted for his political beliefs expressed during those campaigns.

The Charges

Soon after the CEE Board members were elected in 1973, they suspended plaintiff on the basis of certain charges adopted at a Board meeting on October 16, 1973. In light of the highly political nature of the elections, and the identification of plaintiff as "the opposition" to CEE and its candidates, it came as no surprise that the principle defendants and their allies sought to dismiss plaintiff for political expression and activity:

> Charge VII, Specification 1:
>
> On April 29, 1973 and April 30, 1973, you did engage in partisan electioneering by the use of a sound truck.[5]
>
> Charge VII, Specification 3:
>
> That you engaged in partisan political conduct during the campaign for the election of Community School Board members in District 1 on May 1, 1973.
>
> (Pl. Ex. 17)

These two charges formed the underpinnings of plaintiff's First Amendment claims set forth in his initial complaint.

The suspension was short-lived, however. The District Court in the Coalition case issued an order reinstating plaintiff in an effort to maintain the status quo. Ultimately, the Court held that the May 1973 elections were unconstitutional, because of racial and ethnic discrimination, and ordered new elections.[6] Three trustees

5. April 29 and 30 were a Saturday and Sunday. Thus, no charge could be made that plaintiff was campaigning during work hours.

6. Plaintiff was not a party to the Coalition case. However, consistent with the CEE literature, defendant Price identified the plaintiff with the minority Board members who were parties, and in his answer below alleged that plaintiff was "responsible" for his loss of his seat as a result of the Coalition case and counterclaimed for $3,000,000. The Court sua sponte dismissed those counterclaims. (March 18, Opinion p. 35).

were also appointed to govern the District in lieu of the Board. The charges were, in effect, abandoned for a time.

After the May 1974 Court-ordered special elections, the five CEE Board members proceeded to resurrect 31 charges brought in 1973 and added 10 additional charges. Again, they indicted and suspended plaintiff for political expression during the 1973 campaign and added a new politically based charge respecting the 1974 campaign.[7]

Charge II, Specification 5:

> In May 1974, identifying himself as Community Superintendent, Respondent engaged publicly in partisan political activity on behalf of certain candidates for election to the School Board and in opposition to other candidates, certain of whom were thereafter elected to the Board, thereby reducing and impairing his ability to function as an employee of said Board and its duly elected members.
>
> (Pl. Ex. 17)

Plaintiff alleged that these three charges represented the political motivation behind the principle defendants' attempt to remove him from his office. He charged that all other specifications were included for cosmetic purposes only, and he was prepared to prove it to the Court below.

It was clear that the principle defendants were the complainants against plaintiff in the 1974 charges. The exact specifications were drawn up at a non-Board meeting between the principle defendants and an attorney, Richard Aronstein, who was later appointed to prosecute the charges for the Board. (T. 243), (Pl. Ex. 18). Defendant

---

7. The political nature of these charges is supported by defendants' failure to take any action respecting charges filed by plaintiff against a school printing teacher who was allegedly caught in the act of printing campaign literature in support of certain CEE candidates in the school shop during the evening hours. (Pl. Ex. 21, T. 452).

Roher testified that he had brought up a number of the charges, (T. 284), and in doing so had determined that there was "reason to find fault" with the plaintiff. (T. 310). He also testified that he had investigated at least one of the charges. (T. 279).[8] Defendant Price similarly testified that at the meeting of the principle defendants he had more knowledge than most on some of the charges and may have initiated them. (T. 437). During the course of the trial, the Court properly concluded:

> ...I believe it is clear in the record, that Mr. Roher was aware of some of the specifications, has personal knowledge about them and I suppose we can assume for these purposes that he is a complainant.
>
> He has also told us that he had notes which he produced at this meeting of five people and that these notes were the basis of the charges...
>
> (T. 307)

Thus, from the face of the charges, particularly those involving campaign activity, as well as from the testimony of defendants Roher and Price, it is clear that defendants' involvement with the charges predated their becoming adjudicators, and in several instances, even Board members.

Other than the charges growing out of plaintiff's election activities, all the other charges involved plaintiff's direct relationship with members of the Board, and, in particular, Board chairman, defendant Roher. For example, plaintiff is accused of calling Roher a liar (P. Ex. 17, Charge II, Specification 9);

8. At the hearing In the Matter of Luis Fuentes, defendant Roher testified to facts on 3 specifications that he did not know of his own personal knowledge and had learned through investigation. (Roher Administrative Testimony, 184, 189-190, 223).

and, of stating at an executive Board session that he "was through dealing with the chairman as a human being". (Pl. Ex. 17, Charge II, Specification 1). Virtually all other specifications relate to purported statements made by plaintiff to the Board, or purported non-compliance with purported Board directives.

The August 8th Resolution

At the same time the 1974 charges were adopted, the four principle defendants and Ms. Kozlowsky passed a Resolution which they had drafted. (T. 373). That Resolution left no doubts as to their position regarding plaintiff; they made clear their antagonism and political opposition to him:

> 1. The period during which Luis Fuentes has occupied the office of Community Superintendent of District 1 has been marked by increasing violence, dissension, harassment of educational personnel, maladministration of community school affairs, polarization of races, factionalism, and hostile displays culminating in illegal boycotts, interruptions of Community School Board meetings and interference with the proper functioning of the duly elected Community School Board in the discharge of its responsibility to conduct the business of education of the children of the district.
>
> Serious charges against Mr. Fuentes have been presented and are now before the Board for decision. In his dealings with members of the Community School Board, Mr. Fuentes has exhibited antagonism, disrespect and truculence. He has openly flaunted his hostility toward and disregard of the lawful directions of, the duly elected Board, thereby contributing to the disruption of the educational processes in the District. He has publically called for opposition to the lawful decisions, actions and directions of the School Board and has served as a rallying point and focus for the small minority which has interfered with the Board in the exercise of its duties and its authority.
>
> (Pl. Ex. 18)

Although the lower Court, in its Opinion, (at p.4), characterized the Resolution as merely stating the Board's reasons for suspending

plaintiff, Judge Stewart expressed a different view at the hearing.

> THE COURT: It [the Resolution] says pretty flatly in the first paragraph, "The period during which Luis Fuentes has occupied the office as Superintendent of Community School Board District No. 1 has been marked by," and it does on to say various things.
>
> It doesn't say in the first paragraph that Mr. Fuentes was responsible for an increase in violence and so on, but it seems to me it is not hard to suspect in a way that the author of the resolution meant to suggest that it was because of Luis Fuentes all these things would happen.
>
> Then the second paragraph starts out, "Serious charges against Mr. Fuentes have been presented and are now before the Board for a decision."
>
> Again, it doesn't say Mr. Fuentes is responsible.
>
> Then it does say, in the next sentence of the second paragraph, that Mr. Fuentes has exhibited antagonism, disrespect and truculence in dealing with members of the Community School Board. Then it goes on to elaborate on this, and I call particularly to your attention the last part of the last sentence of that paragraph, which says that he has served as a rallying point and focus for the small minority which has interfered with the Board in the exercise of its duties and authority.
>
> Those are absolutely flat statements about Mr. Fuentes. I point out to you that the first paragraph does not say in so many words that he was responsible for the increase in violence, and so forth.
>
> The second paragraph does say that he openly flaunted his hostility and that he exhibited antagonism, disrespect and truculence and he served as a rallying point and focus for the small minority which has interfered with the Board.
>
> Do you have any comment at all you want to make about those statements? (T. 369-371).

Judge Stewart attempted to elicit whether these "absolutely flat statements" reflected a position on the part of defendant Price, but Price declined to answer the Court's critical question and the Court permitted him to do so.

THE COURT: Look at the next paragraph, where it states that Mr. Fuentes does certain things. It says, for example, in the third sentence that he has openly flaunted his hostility towards and disregard of the lawful directions of the duly elected Board, thereby contributing to the disruption of the educational processes in the district.

Do you think that is true or not true?

THE WITNESS: I believe this would place me in a position of a statement your Honor stated earlier, whereby it may bring me into conflict that I may be called upon to present at a later date.[9]

---

9. Judge Stewart's earlier statement to which Price is referring is noteworthy. The Court restricted plaintiff's counsel's probing for whether defendants have a position on the charges prior to any administrative hearing:

THE COURT: You are getting into the borderline area that I have already ruled on.

I don't have to be told what the answer to this question is going to be. I assume it is going to be "yes". You see what my problem is, Mr. Teitelbaum, one of my many problems.

We have been here to define an issue. I think we have finally worked out what I regard to be the issue. I don't think we ought to require a witness to testify on this issue in the context of this on factual matters which will be the subject of a factual investigation.

Now, I recognize that the line drawn is a very thin one. Up to this point, I have been satisfied that all of us, including myself, can properly deal with the issue here without requiring the witness to take the position in the context of this hearing which can be used against him, to put it bluntly, in another hearing, where the questions might be phrased differently and the situation and the circumstances and all the surrounding events will be somewhat different.

I understand when you say two and two equals four, that it equals four forever, but this is the problem I am grappling with, at least one of the problems.

Secondly, in grappling with the problem that Mr. Gopstein keeps reminding me about, is the question of relevance. (T. 299-300).

The clear language of the Resolution, however, confirms the views of the principle defendants as defendant Roher admitted:

> Q In this resolution, the board took a position with respect to Mr. Fuentes' relationship with the Board, didn't it?
>
> * * *
>
> A That is what it shows, yes.
>
> (T. 315)

The Administrative Process

The process by which the charges are to be heard is set forth in paragraph 5 of plaintiff's employment contract which incorporates by reference, with certain modifications, the terms of New York State Education Law, Section 2590-j(7). That provision sets forth the procedures to be applied when a tenured school teacher faces charges. For purposes of plaintiff's contract, section 2590-j(7) is modified to the extent that the Board possesses the powers and performs the duties assigned to the plaintiff under the statute - i.e. the Board may initiate charges, and in advance of filing them must inform the employee of the nature of the complaint.[10]

Under the terms of section 2590-j(7), and the Board's August 8th Resolution, the Board must appoint a hearing examiner who performs the function of presiding over the taking of testimony and the receiving of other evidence and preparing a recommendation to the Board. The Board may either reject, confirm or modify the

10. It should be noted, and as the District Court found, plaintiff did not receive a copy of the charges until they were adopted on August 8, 1974. (March 18, Opinion p.5). The failure to inform plaintiff of the nature of the charges violates the procedures set forth in §2590-j(7). This finding was, however, clearly contradicted when the District Court determined that defendants complied with their §2590-j(7) obligations. (March 18, Opinion p.12). The Court relied on an administrative determination in n.12 which was inapposite since it only resolved the right of the public to receive notice of the August 8th meeting under the Board's By-laws and did not determine plaintiff's rights in any way.

examiner's report. In short, the Board possesses absolute authority to decide plaintiff's culpability at the stage at which the record is made. (T. 56). Several weeks after passing the August 8th Resolution, Richard Aronstein, the attorney who together with the principle defendants participated in the drafting of the charges and the Resolution, selected Marcy Cowan,[11] and received the approval of defendant Roher.

At the administrative hearings, Mr. Aronstein, representing the Board, served as the prosecutor of the charges. (Roher Administrative Testimony). At the outset, therefore, it was apparent that the four principle defendant Board members were serving in two capacities, complainants and prosecutor. But, the multiplicity of roles went further. On October 31 defendant Roher appeared as the first witness to testify in support of the charges. He swore under oath that eleven of the forty-one charges were true. (See pp. 21 to 24 infra.). He will, thereafter, determine the credibility and probative value of his own testimony offered as a witness, and on that basis determine plaintiff's culpability with respect to these charges. This inconsistent combination of judge and accusing witness, plaintiff argued below, constitutes the most falgrant distortion of a fair hearing.

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11. The plaintiff during the hearing challenged the impartiality of the hearing examiner chosen by defendant, Marcy Cowan. However, the focus of this case was always on the real decision-makers, the defendants. In any event, the issue of Mr. Cowan's bias has been obviated by his resignation from the case almost three months ago.

Defendants Believe the Charges to Be True

The District Court determined that the only two defendant Board members who plaintiff was allowed to call as witnesses believed certain of the charges to be true. (March 18, Opinion pp. 28-29). That conclusion was inescapable as the following colloquy shows:

> THE COURT: Mr. Roher, do you believe that any of these charges are true?
>
> THE WITNESS: I really, you know, felt it was a purpose of the hearing to bring forth enough information that I could have a strong opinion, a stronger opinion about them.
>
> THE COURT: At this point in time, do you believe that any of them are true?
>
> THE WITNESS: Yes.
>
> (T. 265)

Defendant Price testified:

> THE COURT: Do you have any view as to whether or not any of those charges are correct?
>
> THE WITNESS: Yes, I do have a view.
>
> THE COURT: What is your view? Yes or no?
>
> THE WITNESS: It varies on different charges.
>
> (T. 359)

Judge Stewart was presented with defendant's views of particular charges:

> Charge II, Specification 9:
>
> In September 1973, at a public meeting of the Board, while in attendance in his capacity as Community Superintendent, Respondent publicly stated that the Chairman of the Board, who was

then presiding at a meeting as such, was a liar. (Plaintiff's Exhibit 17)

Defendant Adolph Roher:

Q. Did Mr. Fuentes ever call you a liar, Mr. Roher?

A. Yes, sir.

Q. Was that at a public meeting?

A. Yes.

(T. 202)

Charge II, Specification 5:

In May, 1974, identifying himself as Community Superintendent, Respondent engaged publicly in partisan political activity on behalf of certain candidates for election to the School Board and in opposition to other candidates, certain of whom were thereafter elected to the Board, thereby reducing and impairing his ability to function as an employee of said Board and its duly elected members. (Pl. Ex. 17)

Defendant Adolph Roher

THE COURT: How do you know he supported Ramos in '74?

A. I believe it was May 11, 1974. A letter appeared in the New York Times Saturday, signed by Mr. Fuentes in support of the group, the Por Los Ninos group of which Mr. Ramos was a member. (T. 217)

The transcript of the administrative hearing on October 31 is replete with more specific examples of defendant Roher's views as to the truth of the charges.

Charge II, Specification 1:

In May 1974, at an executive meeting of the Board, Respondent was insolent and insubordinate to the Chairman of the Board

then presiding in stating to the Chairman in the presence of members of the Board, words to the effect that Respondent was through taking verbal directions on School District matters from the Chairman and that he would not respond to any such directions unless same were put in writing to him, and that Respondent was through dealing with the Chairman as a human being. (Pl. Ex. 17).

Defendant Adolph Roher:

> [Mr. Fuentes] said "I am through with this Mickey Mouse. I am through relating to him as a human being. And from now on if you want something from me you will have to give it to me in writing."
>
> (Roher Administrative Testimony 155-156)

Charge II, Specification 2:

2. At said executive meeting of the Board held in June, 1974 Respondent left the meeting before its conclusion, contrary to express directions of the Board that he remain in his official capacity of Community Superintendent and in violation of the By-laws of the Board and his employment contract. (Pl. Ex. 17)

Defendant Adolph Roher:

> Q. Following those remards by Mr. Fuentes did he remain at the meeting?
>
> A No.
>
> Q What did he do?
>
> A He got up and he started to walk out of the room. And I said "Mr. Fuentes, please remain." And as he continued to walk out I said "Mr. Fuentes, I want you to remain." And then as he got through the door I said "Mr. Fuentes, I order you to remain."
>
> And to be certain, I walked out into the hall, and he was a good deal distance in front of me, and I repeated again, "Mr. Fuentes, I order you to remain. And he kept walking out.
>
> (Roher Administrative Testimony 156-157)

Charge II, Specification 3:

At a public meeting of the Board held in June 1974, Respondent, in violation of the ruling of the Chairman that a question addressed to the Respondent relating to racial composition of a group of employees of the District was out of order, persisted in answering said question and stated to the Chairman words to the effect that this was not the first time the Respondent had been out of order and that it would not be the last time. (Pl. Ex. 17)

Defendant Adolph Roher:

> A. Okay. Mr. Fuentes took the microphone to answer. I asked him to give me the microphone first because I had something to say, which he did. And I advised him at that time that the same question had been asked previously, and that I had then ruled it out of order, and that it was still out of order, and that I wanted him to know it.
>
> He took the microphone and he answered "This is not the first time I have been out of order and it won't be the last," and then proceeded to answer the question.
>
> Q What did his answer consist of?
>
> A The answer consisted of a racial breakdown of a group of employees. That is, such a percent Puerto Ricans, such a percent black, such a percent white.
>
> (Roher Administrative Testimony 169-170)

Charge II, Specification 4:

In June 1974, Respondent ordered the Deputy Superintendent not to attend executive meetings of the Board, knowing that said Deputy Superintendent had been expressly invited and directed to appear at said meeting. As a result thereof, the Deputy Superintendent failed to attend at said meetings, thereby impeding the Board in the performance of its duties. (Pl. Ex. 17).

Defendant Adolph Roher:

> A. [Mrs. Ann Mersereau,] Deputy Superintendent told me in each instance that she informed Mr. Fuentes that she was invited. And each time he told her that "I am in charge here and you take orders from me"--meaning himself.
>
> (Roher Administrative Testimony 164)

Defendant Roher also gave lengthy testimony on Charge II, Specification 6 (at Roher Administrative Testimony 175-184);Charge II, Specification 7 (at Roher Administrative Testimony 185-193); Charge II, Specification 8 (at Roher Administrative Testimony 193-201); Charge II, Specification 9 (at Roher Administrative Testimony 202-215); Charge IV, Specification 1 (at Roher Administrative Testimony 216-225); Charge IV Specification 2 (at Roher Administrative Testimony 225-238).

The District Court's Evidentiary Ruling Respecting the Charges

The substantial facts regarding defendants Roher and Price's views as to the truth of the charges, in general, and certain charges, in specific, were presented despite Judge Stewart's repeated rulings forbibbing plaintiff from probing defendants' views and prior involvement with specific charges.

> Q. Do you recognize charge 1 of specification 1?
>
> [Defendant Adolph Roher] A Yes. Sir.
>
> A Do you have any knowledge of any of the facts contained in that specification
>
> MR. GOPSTEIN: Objection
>
> THE COURT: I will allow a yes or no answer to that question.
>
> A Let me read it carefully.
>
> (Pause)
>
> A Do I have any knowledge of any of the facts, yes.
>
> THE COURT: Do you have any knowledge of any of the facts enumerated in the specifications?

THE WITNESS: Yes.

Q Have you formed an opinion as to the truth of this specification?

MR. GOPSTEIN: Objection, Your Honor.

THE COURT: Sustained

Q Have you formed an opinion as to this specification?

MR. GOPSTEIN: Objection.

THE COURT: I don't know what that question means. I think it means the same thing as the prior question and I sustained the objection.

(T. 259)

The Court continually sustained objections to questions of this nature. (See e.g. T. 256, 264, 265, 305, 323, 373).

The Court's ruling during the trial with regard to plaintiff's right to probe for bias and prejudgment is encapsulated in this quote which followed a long colloquy between the attorneys on this issue:

> I am not going to change my ruling, Mr. Teitelbaum If you are entitled to get into matters which can show or may show prejudgment, bias, prejudice in an unflexible way but I don't see that it makes much sense to get into matters of the kind you want to get into, what are his views about these charges. He would not have been doing his job if he didn't have a strong view that these charges should be brought. (Emphasis added.)

Or, perhaps the Court's opinion on how to demonstrate bias is more apt since it indicates the narrow view of bias applied by the Court. When defendant Roher was asked whether in his view

the plaintiff had performed unsatisfactorily in the months of June and July, 1974; the Court, responding to the objection of defendants' counsel that the question went to the merits of the charges pending against the plaintiff, entered into the following discussion:

> MR. TEITELBAUM: The truth whether Superintendent Fuentes performed satisfactorily is not at issue. What is at issue is what is in the witness' mind, what is his view?
>
> THE COURT: I would think it follows from that that Mr. Gopstein [defendants' counsel] may be required to prove that he was justified in having that view in his mind.
>
> MR. TEITELBAUM: What Mr. Gopstein's burden would be is that this witness is not biased.
>
> THE COURT: The best way to show that is--
>
> MR. TEITELBAUM: Is to show he has an open mind.
>
> THE COURT: No, to show that Mr. Fuentes did not perform satisfactorily and therefore his mind is open because he reached an appropriate conclusion. There are two ways to show an open mind, at least two ways.
>
> (T. 301)

In other words, in the District Court' opinion, the defendants would not be biased if their conclusions in regards to the charges were correct.

Now There Is No Hearing

The last chapter of this case below was written after the complaint had been dismissed. Central to the District Court's decision is the finding that there was an adequate hearing process.

However, as the Court, indicates in footnote 18 to the Opinion:

> We have been advised by counsel for plaintiff in affidavits dated February 20 and February 28, 1975 that hearing examiner Cowan resigned in early February and that as of February 28 no hearing officer had been chosen. The failure of defendants to appoint promptly a new hearing officer obviously bears importantly upon the adequacy of the administrative procedures to provide plaintiff with a speedy administrative remedy. If this situation continues, the court will be disposed to consider an appropriate remedy.

On the oral motion of plaintiff for reconsideration, the Court met with counsel to resolve the failure of the Board to appoint a hearing examiner. The situation had reached loggerheads since defendant Carolyn Kozlowsky, as was indicated above, had decided to withdraw her support of the prosecution of the charges and wanted to have the plaintiff reinstated. (Affidavit of Carolyn Kozlowsky sworn to the 29th day of March 1975, attached to the affidavit of Herbert Teitelbaum, sworn to April 2, 1975). Although the prosecution was, in effect, terminated, there were insufficient votes to drop the charges and reinstate plaintiff. One defendant, Henry Ramos, has been out of the State, and by reason of his absence, the five Board members who wish to reinstate plaintiff are unable to do so.

The Court looked to the Chancellor of the New York City School District, who is not a party to this action, to resolve this deadlock and appoint a hearing examiner, but the Chancellor was unwilling to act within the time-frame that the District Court believed necessary to protect the rights of the plaintiff (Transcript of April 2, 1975). As a result, even though the Court was aware that

five of the nine of the Board members no longer wanted to prosecute the charges, the District Court ordered the Board to appoint a hearing examiner by April 11. (Memorandum and Order of April 3, 1975). Thereafter, by an order nunc pro tunc as of April 3, the District Court reaffirmed its March 18 decision and thereby relinquished all jurisdiction over the case.

To date there is no hearing examiner and there has not been one for almost three months.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN FINDING THE ADMINISTRATIVE PROCESS CONSTITUTIONAL AND ADEQUATE IN LIGHT OF DEFENDANTS' UNWILLINGNESS TO PROSECUTE THE CHARGES

Plaintiff is in the untenable position of having to endure a suspension from his employment on the basis of charges which the Board is unwilling to prosecute. As the appeals by Ramos, Hoggard, Barreto, Wong, and Kozlowsky indicate, a majority of the Board does not wish to prosecute the Charges any longer. However, because one member of the Board, defendant Henry Ramos, is out of state indefinitely and because a majority vote of five defendants at a public meeting is necessary for Board action, there is an insufficient number of votes to drop the charges and lift the suspension. Simply put, plaintiff is not only suspended and accused of misconduct affecting his professional and personal reputation and contract rights, but there is no forum to clear his name and restore him to his rightful position. As a result, plaintiff is in a state of unconstitutional limbo.

To maintain plaintiff's suspension and the charges against him without providing a speedy hearing or even the possibility of a hearing in the future, violates his rights to due process as enunciated in Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972) and their progeny. In

Goss v. Lopez ____U.S.____,43 U.S.L.W. 4181 (Jan. 22, 1975), the Supreme Court declared unconstitutional even ten day-student suspensions without hearings. The facts before this Court are far more egregious than those present in Goss.

These facts were presented to Judge Stewart and resulted in the April 3, 1974 Order.[12] However, the lower Court refused to find that plaintiff's due process rights were violated, and refused to order the charges dropped and plaintiff reinstated. Instead, Judge Stewart, without finding a constitutional violation, determined that plaintiff was entitled a hearing and ordered the Board to prosecute him. Plaintiff argued that the relief to be ordered when an unwilling prosecutor refuses to prosecute, such as in the criminal area, is the dismissal of the charges and not the compulsion of prosecution. In view of the positions of five members of the Board who are unwilling to prosecute and who want the charges dropped, it is futile as well as unconstitutional for plaintiff to have to exhaust what amounts to a non-existent process and continue to retain paid counsel to do so. The proper relief was for the District Court to put an end to this bizarre and unfair "process", rather than adopting an extraordinary course of urging it onward.

12. There is a serious question as to whether Judge Stewart had the authority to issue the April 3 Order without reinstating the complaint upon plaintiff's motion for reconsideration based on new facts. In any event, in light of Judge Stewart's Order nunc pro tunc as of April 3 there can be no question that the action below is terminated and the April 3 and March 18 Orders are final orders.

POINT II

THE DISTRICT COURT ERRED IN FAILING TO FIND A DUE PROCESS VIOLATION

The District Court Erred In Failing to Find That Defendants Roher and Price Are Biased and Have Prejudged the Issues

Before the state deprives an individual of his rights to liberty or property, he must be afforded, as part of his bundle of due process rights, an unbiased and impartial tribunal. Gibson v. Berryhill, 411 U.S. 564 (1973); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Wasson v. Trowbridge, 382 F.2d 807, 813 (2nd Cir. 1967); Winnick v. Manning, 460 F.2d 545 (2nd Cir. 1972); Blanton v. State University of New York, 489 F.2d 377, 386 (2nd Cir. 1973); King v. Caesar Rodney School District, 380 F. Supp. 1112 (D. Del. 1974).

To establish impermissible bias and prejudgment plaintiff need not prove actual bias and an inflexible view respecting the truth of the charges. "[A] possible temptation" to try a case with bias (See Gibson v. Berryhill, supra; Ward v. Village of Monroeville, supra); or, a "presumption" of bias (See Wasson v. Trowbridge, supra)[13]; or, even the

13. A presumption of bias is created when the adjudicator of the guilt or innocence has "prior contact" with the case. Wasson v. Trowbridge, supra at 813.

"appearance" of bias or partiality (See American Cyanamid v. F.T.C., 363 F.2d 757 (6th Cir. 1966)[14] , is sufficient to trigger a violation of plaintiff's right to a fair tribunal. See also, Gilligan, Will & Co. v. S.E.C., 267 F.2d 461, 469 (2nd Cir.) cert. denied 361 U.S. 869 (1959); Cinderella Career and Finishing Schools v. F.T.C., 425 F.2d 583, 591 (D.C. Cir. 1970).[15] The Court below in its March 18 Opinion correctly held that "a presumption of bias or an appearance of bias is sufficient to show a violation of due process." (at p. 23). However, the District Court applied that standard in such a way as to gut it of any meaning or use.[16]

The two principle defendants alleged to be biased are Adolph Roher and Richard Lee Price, who appeared as

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14.The appearance of bias is created by the adjudicator investigating and taking a position on the facts or the law prior to the determination. In American Cyanamid, one of the adjudicators had investigated some of the facts for the United States Senate.

15.The Court below in footnote 16 of the March 18 Opinion points out that the Gibson ruling was on the basis of a pecuniary interest. However, the Supreme Court indicated in its opinion at pp. 587-579 and this Court ruled in Wasson, that prejudgment of the issues by virtue of prior involvement is impermissible, and that the notion of bias goes beyond property.

16.Defendants attempted to persuade the lower Court that plaintiffs did not have a right to an impartial tribunal relying exclusively on Beattie v. Roberts, 436 F.2d 747 (1st Cir. 1971). Apparently, Judge Stewart did not agree with defendants (in principle at least) since the First Circuit in Beattie noted that the rule in the Second Circuit required impartiality. Id. at 751, n.

witnesses below. As to defendant Roher's views and prior involvement with the charges, the District Court was presented with the following uncontroverted facts, among others:

(1) Roher was the complainant and brought a number of the charges himself. (T. 284)

(2) Roher investigated at least one of the charges. (T. 279).

(3) Roher stated in Court that he believed some of the charges to be true. (See March 18 Opinion at p. 28) (T. 265).

(4) Roher stated in Court that Charge II Specifications 8 and 9 were true. (T. 202, 237).

(5) Roher served as the Board's principle witness against plaintiff at the administrative hearings on October 31, 1974 and testified as to plaintiff's culpability regarding eleven separate specifications. (Teitelbaum affidavit sworn to November 19, 1974 annexed to which is portions of the transcript of the administrative hearings of October 31, In the Matter of Luis Fuentes).

(6) Roher voted to adopt a Resolution on August 8, 1974 condemning plaintiff for committing many of the acts set forth in the charges. (Pl. Ex. 18).

Similarly, defendant Price stated in open Court that:

(1) Several of the charges were correct. (T. 359)

(2) He knew that plaintiff did certain items listed in the charges. (T. 409).

(3) He had voted for the August 8 Resolution

condemning the plaintiff.[17]

For an adjudicator to testify at the administrative hearing on behalf of the prosecution as to the veracity of charges which he will thereafter judge, is the clearest example of actual bias and prejudgment, much less an appearance of bias and prejudgment. If the standard of bias is not satisfied by an adjudicator testifying both in the lower Court and at the administrative hearing as to the truth of the charges, then bias becomes a meaningless due process requirement.[18]

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17. In addition, both defendants allowed their names and pictures to be used in C.E.E. campaign literature which identified plaintiff as the political opposition. Although defendants attempted at the trial to disassociate themselves from the vituperative statements made against plaintiff during the campaign, the presence of the 3 political charges demonstrate that their bias against plaintiff is politically motivated.

18. Cases requiring judges to recuse themselves under certain circumstances, when ruling on criminal contempt offer apt analogies to this instant case. In Johnson v. Mississippi, 403 U.S. 212, 215 (1971), the Supreme Court indicated that:

> ...a fair hearing would entail the opportunity to show that the version of the event related to the judge was inaccurate, misleading or incomplete.

This becomes virtually impossible when that "version" is the judge's own, as with Roher and Price. The Supreme Court ruled that the trial judge could not preside at the contempt hearing because he was:

> ...so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit.

See Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971)("Our conclusion is that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the the one reviled by the contemnor"); In re Dellinger, 461 F.2d 389 (7th Cir. 1972).

The District Court responded to these facts establishing bias and prejudgment by simply determining that notwithstanding their beliefs and testimony as to the truth of the charges, defendants Roher and Price would look into the record of the administrative hearings before "draw[ing] any final conclusions" as to how they would vote on the charges (March 18 Opinion 28-30). What the District Court failed to perceive is that the record of the administrative hearings, in substantial part, consists of defendant Roher's very own testimony when he was called as the Board's first witness. Moreover, to require plaintiff to demonstrate that those charged with bias and prejudgment have an unalterable position on the charges, is inconsistent with the standards adopted by the District Court, itself, in its attempt to assess whether the due process clause had been violated. The breadth of that standard was described by Mr. Justice Black in In re Murchison, 349 U.S. 133, 136 (1955), a criminal case, and adopted as the standard in civil cases:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear, and true between the State and the accused

> denies the latter due process of law." Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L. Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11,,...

See American Cyanamid Co. v. F.T.C., supra at 763-764. The misapplication of the standards embraced by the Court below is demonstrated by its treatment of this Court's holding in Wasson v. Trowbridge, supra. The District Court determined that:

> ...in the absence of evidence that the Board members could be presumed to be biased against plaintiff Fuentes, we conclude that it is not unconstitutionally impermissible for the board members to draw up charges against Fuentes which they believe to be true, and then pass on those charges at a later date. (March 18 Opinion at p. 21)

An adjudicator's belief in the truth of charges coupled with his offering of testimony, under oath, as to the truth of the charges, in a hearing in which he will thereafter vote on the truth of the charges, certainly violates the standard in this Circuit as enunciated in Wasson and its progeny. The lower Court erred in its application of Wasson and in failing to consider the above facts as sufficient to find defendants

Roher and Price at least presumptively, if not actually biased.[19]

The Combining of Inconsistent Roles of Judge, Prosecutor, Witness and Complainant In One Single Individual Violates Due Process

Although the Supreme Court has not definitively ruled on the issue of whether an individual complainant may also serve as prosecutor, witness and judge at the level at which the facts are determined, it did express its views on this issue in Pickering v. Board of Education, 391 U.S. 563, 579 n. 14 (1968).

> [W]e do not propose to blind ourselves to the obvious defects in the fact finding process occasioned by the board's multiple functioning vis a vis appellant.

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19. The Court below cited Simard v. Board of Education of Town of Groton, 473 F.2d 988 (2nd Cir. 1973), and correctly ruled that under the circumstances presented in the instant case a showing of apparent bias is sufficient. (March 18 Opinion, p. 22). In Simard, allegations of bias were limited to facts demonstrating that the teacher was involved in contract negotiations with the Board; and, that the Board concurred in the superintendent's decision to not offer tenure. The Court found that the Superintendent was at all times the moving force in the matter of tenure denial. This Court concluded that the "very limited nature of the school board's prior involvement here is entirely consistent with due process." at 993. The facts of this case are entirely different. Defendants Roher and Price have had substantial involvement with the charges both before and after they were brought. They, and others, were the "moving force" behind the charges. Roher's and Price's testimony in Court, and Roher's testimony at the administrative hearings present a case of bias and prejudgment going far beyond Simard.

The practice of combining multiple, inconsistent functions in an administrative agency has become a common practice, but the combining of such functions in a single individual is not permissible. See American Cyanamid Co. v. F.T.C. supra at 767 and cases cited therein; Davis, Administrative Law, §13.01, (Third Ed., 1972). To preserve and protect the impartiality of the hearing process the internal separation of inconsistent functions within the agencies is necessary. In most federal agencies this separation is achieved by insulating the final decision makers from those individuals who investigate and bring charges. See e.g. F.T.C. v. Cinderella Career and Finishing School, 404 F.2d 1308, 1315, 1323 (D.C. Cir. 1968). In Richardson v. Perales, 402 U.S. 389, 403 (1971), a case involving the social security system, the Supreme Court observed with respect to the multiplicity of roles:

> The vast workings of the social security administrative system make for reliability and impartiality in the consultant reports. We bear in mind that the agency operates essentially, and is intended to do so, as an adjudicator and not as an advocate or adversary.

But in the instant case, individual Board members empowered to make the ultimate findings of fact as judges are also the investigators, advocates, and witnesses and certainly are in an adversarial position to plaintiff. Under more limited facts the Court in

American Cyanamid found that to investigate facts and thereafter rule on them constituted an appearance of bias and was impermissible:

> It is to be emphasized that the Commission is a fact-finding body. As Chairman, Mr. Dixon sat with the other members as triers of the facts and joined in making the factual determination upon which the order of the Commission is based. As counsel for the Senate Subcommittee, he had investigated and developed many of these same facts. Id. at 767.

This combining of functions, itself, is sufficient to constitute a due process violation: it certainly creates an appearance of bias. The District Court, however, erroneously determined that because the decision of the defendants was appealable, these inconsistent roles did not violate plaintiff's due process rights.

The Administrative Appellate Review In This Case Is Not a Constitutional Cure

Erroneously relying on Blanton v. State University of New York, 489 F.2d 377 (2d Cir. 1973), the District Court ruled that assuming defendants are biased, "if an avowedly neutral decision maker is provided at a later stage of the administrative procedure, 'a previous flaw, if any becomes immaterial'." (March 18 Opinion at p. 21). First, as discussed supra at p. 29 , whatever applicability Blanton had to this case is dissipated by the failure of the defendants to provide plaintiff a hearing on the charges. However, putting aside the

due process violations arising from the absence of a hearing, Blanton cannot be used to cure defendants' bias under the facts of this case.

In Blanton, a number of students were suspended from a state college, and filed a federal lawsuit alleging violations of their constitutional rights. They appeared before the Discipline Hearing Committee, a body analogous to the Hearing Examiner herein since it could only make recommendations to the University President. The Committee recommended suspension of the students. The President, like the Board herein, possessed the actual authority to suspend or dismiss. He reviewed the Committee's recommendation and adopted it. This Court determined that whatever constitutional defects existed at the level of the Disciplinary Committee, the recommending body, they could be cured by resort to the President, the real authority. This Court found that since the President:(i) had no prior involvement whatsoever with the charges he could not be presumed to be biased under Wasson v. Trowbridge, supra; (ii) was in no way bound by the Committee's recommendations, could take new evidence, and make independent factual determinations respecting the charges; (iii) offered a speedy hearing after the Committee rendered its recommendation; and,(iv) was able to receive the case and render a decision prior to the taking of any adverse action, any possible bias in the Committee was

remedied at the level at which the first authoritative decision was made - the President.

Comparing Blanton to the present case, it is clear that defendant Board members occupy the same administrative position as the President, but unlike the President certain of the defendants are tainted with bias, prejudgment and prior involvement. The President's impartiality coupled with his authority to act independently of any recommendation of the Committee, and to make his own factual findings was crucial to the outcome of the Blanton case.

Certainly, neither the Board of Education nor the Commissioner of Education can be compared to the University President.[20] These bodies, as opposed to the President, receive a case after an authoritative decision is made, after ultimate factual determinations have been rendered which can be upset

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20 The District Court, in relying heavily on the availability of an appeal to the Board of Education, recognized that the Board might not consider itself obligated to hear an appeal from plaintiff. (March 18 Opinion n. 13). Attempting to dispel this uncertainty, Judge Stewart reasoned that since defendants "indicated such an appeal would lie" the Board of Education would somehow feel bound by defendants' views. Clearly, defendants have no authority to define the appellate jurisdiction of the Board of Education, and the lower Court was in error to rely on "indications" from defendants. Moreover, defendants were quite equivocal as to the availability of an appeal to the Board of Education, since it was not a party to plaintiff's employment contract. (Transcript of Oral Argument, Dec. 2, 1974 at 41).

only for arbitrariness, and after adverse action is taken. There is no trial de novo before these bodies, and the opportunity for a trial de novo was essential to Blanton and Winnick v. Manning, 460 F.2d 545 (2d Cir. 1972), upon which the Blanton Court, supra at 386, placed exclusive reliance. In Winnick, this Court, relying on Wasson v. Trowbridge, supra, unequivocally stated that impartiality was "a fundamental requirement" at the hearing stage. The Court further determined that whatever bias and other irregularities may have existed at a stage preliminary to the taking of any action "were cured by a full disciplinary hearing on June 2, which in effect was a trial de novo." Id. at 549.

No trial de novo exists here. The Commissioner outlined the narrow standard of review exercised by him In the Matter of the Appeal of Thomas W. Cunningham, 12 Ed. Dept. Rep. 204, 207 (1973).

> I will not substitute my judgment for that of the board of education with regard to its determination concerning the proof of the charges against a tenured teacher and the penalty assessed therefor unless it appears from the record that the board of education was arbitrary. [citations omitted].

Without the availability of a speedy trial de novo before a higher authoritative body prior to the taking of any adverse action, the administrative procedure here is

completely different from the procedure in Blanton. Moreover, in both Blanton and Winnick, not only did a decision by the unbiased bodies occur prior to taking any adverse action, but an opportunity to appear before these bodies and have a decision rendered in each case occurred within one week after decisions by the bodies charged with bias. The filing of an appeal to and the rendering of a decision from the Commissioner of Education requires months. As footnote 12 of the lower Court's opinion indicates, an appeal to the Commissioner was filed by certain defendants in September, 1974. Approximately eight months have passed and no decision has been rendered.

Finally, to the extent that Blanton is employed to vitiate the bias at the level at which the facts are determined, it is in conflict with the pronouncements of the Supreme Court of the United States. In Ward v. Village of Monroeville, supra, at 61-62, the Court ruled that a person is entitled to a neutral and detached judge in the first instance:

> Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial de novo in the County Court of Common Pleas. We disagree. This "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event,

> may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance. (Emphasis added)

Accord, Gibson v. Berryhill, supra.[21] Here, plaintiff is entitled to a neutral and detached judge at the stage where the Board hears his case. It is at this stage that plaintiff's fate will be determined. Any hearing had subsequent to the point at which the Board makes its decision is only a review and is strictly limited in scope.

Plaintiff Did not Waive His Due Process Right To An Impartial Tribunal

The District Court raised, without reaching, the question as to whether or not, by entering into a contract with the Board which incorporates Education Law Section 2590-j(7)[22] plaintiff had waived his due process right to an impartial tribunal which has not prejudged the facts and the law. (March 18 Opinion, n. 22).

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21. In Arnett v. Kennedy, 416 U.S. 134 (1974), where after the initial decision of a supervisor to dismiss an employee, a full evidentiary hearing was provided before an impartial tribunal, six Justices (Powell, Blackmun, White, Marshall, Douglas, and Brennan) agreed that at the point at which the facts are established impartiality is required.

22. See Appendix

Clearly, a waiver of constitutional rights must be explicit. In the absence of unequivocable words or acts by the parties which indicate a waiver, there is a strong presumption againt waiver of constitutional rights. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937); Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937); see also D.H. Overmyer Co. v. Frick, Co., 405 U.S. 174 (1972).

In a strikingly similar case, King v. Caesar Rodney School District, supra, at 1117-1118 Chief Judge Wright disposed of a due process waiver argument:

> Defendants claim that plaintiff conscientiously and knowingly failed request a statutory termination hearing and therefore has waived the right to complain of the nature of the hearing that would have been afforded. Defendants rely on this Court's decision in Hayes v. Cape Henlopen School District, 341 F. Supp. 823 (D. Del. 1972), which held that a school employee who voluntarily failed to attend a hearing offered by the school board had waived the right to complain that no hearing had been provided. That case is plainly distinguishable, as the Court there indicated:
>
> "It is axiomatic that an individual who voluntarily refuses to participate in a hearing offered by an administrative board waives his procedural due process rights to a hearing and is precluded from subsequently challenging the board for failing to provide him with a hearing.[19]"
>
> "19. This is not a case where the plaintiff has challenged specific inadequacies in the hearing provided, e.g., biased decision maker, no cross examination, etc. In such

a case, failure to attend the allegedly inadequate hearing would presumably not constitute a waiver. 341 F. Supp. at 834."

The Supreme Court has repeatedly stated that waiver of a constitutional right should not lightly be inferred, and that courts should indulge every reasonable presumption against waiver. Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed. 2d 124 (1972); Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094 (1967); Ohio Bell Tel. Co. v. Public Utilities Commission, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1973); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177 (1937). Plaintiff has insisted ever since the filing of this suit, at the latest, that the Board improperly prejudged his case. If plaintiff's legal theory is correct, he could not have been given a fair termination hearing because of the Board's pre-hearing familiarity with all of the evidence. The Court cannot read plaintiff's actions as a waiver of his constitutional claim to an impartial hearing panel and it must, therefore, decide the issue on its merits. [23]

See Kaprelian v. Texas Woman's University, 509 F.2d 133, 138

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23. The cases relied upon by Judge Wright, including D.H. Overmyer Co. v. Frick Co., supra, Ohio Bell Telephone Co. v. Public Utilities Commission, supra and Aetna Insurance Co. v. Kennedy, indicate that to claim abandonment of constitutional rights in the civil area raises the same questions as in the criminal area; i.e. was the waiver voluntary, knowing and intelligently made. See Brady v. United States, 397 U.S. 742, 756 (1970); Miranda v. Arizona, 384 U.S. 436, 444 (1966).

(5th Cir. 1975).

Any reliance on Arnett v. Kennedy, supra, to support a waiver would be misplaced. In Arnett the Court determined that the employees substantive due process rights were "inextricably intertwined with the limitations on the procedures", which limitations were specifically enumerated in the statute. Accordingly, the Court determined that Congress was authorized to place limitations on the substantive right it statutorily created.

Nothing in plaintiff's contract states, or even implies, that plaintiff relinquished his due process rights to an unbiased hearing free from prejudgment. Plaintiff's contract merely chooses the method by which charges against him are to be brought. By choosing such procedure as outlined in §2590(j)(7), plaintiff has not waived his right to a due process hearing before an impartial decision maker. Surely, when one chooses a jury and not a judge to decide a case, such choice does not constitute a waiver of the right to challenge members of the jury on the basis of their partiality or bias. The same principle applies to administrative officers when one selects an administrative agency to hear his case. State statutes such as §2590(j)(7), which govern the hearing procedure for tenured teachers, are presumed to be constitutional and, thus, must be construed as requiring an unbiased and impartial tribunal. Any other interpretation of §2590(j)(7), would render it unconstitutional. By

incorporating §2590(j)(7) by reference, plaintiff's contract did not delete or dilute this constitutional presumption. "The matter comes down to the question of the procedures' integrity and fundamental fairness." Richardson v. Perales, supra at 410.

To find a waiver of the right to an unbiased hearing in this case, such a waiver would have to be spelled out clearly and explicitly in plaintiff's contract, and in contrast to Arnett, the contract does not even refer to a limitation on the right to a hearing panel whose members have not prejudged the issues.

Finally, unlike the plaintiff in Arnett, plaintiff here has a distinct liberty right at stake. The charges against plaintiff place his reputation in question. The Supreme Court in Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), held due process rights were required when a persons "...good name, reputation, honor or integrity is at stake", and in Roth, supra at 573, the Court held due process rights attached when "the State, in declining to re-employ [the respondent], imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities...."

Clearly, charges of dishonesty and the commission of acts which are tantamount to crimes are of the type envisioned by Constantineau, Roth and Arnett. See, Lombard v. Board of

Education, 502 F.2d 631, 637 (2d Cir. 1974), cert. denied U.S. S.Ct. March 17, 1975. Thus, plaintiff's due process rights stem not only from his property interest in his employment, but in his liberty interest in his reputation as well. This latter interest affords him an independent right to an unbiased hearing free from prejudgment at the fact determining level apart from whatever is contained in his contract.

The District Court Erred in Preventing Plaintiff from Probing for Defendants' Views as to All Specific Charges

Defendants Roher and Price unequivocally testified under oath as to the truth of the charges. Defendant Roher testified in Court and at the administrative hearing as to the truth of many specific charges. These facts are sufficient to trigger a due process violation.

Nevertheless, Judge Stewart erred in preventing plaintiff from probing defendants' views and prior involvement as to all charges. Such lines of questioning are necessary not to show that the charges are, in fact, true or false, but to determine whether defendants have prejudged the charges and the type of prior contact with which this Court was so concerned in Wasson. The substantial proof of bias and prejudgment was elicited despite Judge Stewart's ruling which seemed to be premised on the mistaken notion that defendants' bias and prejudgment are constitutional if the charges can be sustained. (T. 301). Such a truncated view of bias and prejudgment is contrary to the standards in Wasson, and even the standard that the lower Court held it

was required to adopt. In any event, sufficient proof is in the record to establish actual as well as presumptive or apparent bias and prejudgment.

POINT III

THE DISTRICT COURT ERRED IN NOT REACHING PLAINTIFF'S FIRST AMENDMENT CLAIMS, AND IN NOT DECLARING THE CHARGES UNCONSTITUTIONAL

The Supreme Court has ruled that public school personnel, including teachers and students, are entitled to basic First Amendment rights in the absence of a showing that a given expression of opinion would create a concrete danger of dislocation of the educational process. Pickering v. Board of Education, 391 U.S. 563 (1968); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); See also Stolberg v. Board of Trustees for State College of Connecticut, 474 F.2d 485 (2d Cir. 1973); James v. Board of Education, 461 F.2d 566 (2d Cir. 1972); Hanover v. Northrup, 325 F.Supp. 170 (D. Conn. 1970).

The three key charges[24] seek to punish plaintiff because: (i) he "engaged in partisan political activity" in May 1974 and by reason thereof his ability to function as an employee of the Board is impaired; (ii) he "engage[d] in partisan electioneering by the use of a sound truck" on April 29 and 30, a Saturday and Sunday when plaintiff was not at work; and, (iii) he "engaged in partisan political conduct during the campaign" in 1973.

On their face the charges are contrary to Pickering.

24. Charge II, specification 5, Charge VII, specification 1, and Charge VII, specification 3.

In Pickering v. Board of Education, supra, a school teacher had published an open letter in a local newspaper attacking the fiscal policies of the school board and decrying the "totalitarianism" to which local high school teachers were subjected. The teacher was dismissed because the school board found that his letter contained erroneous information "detrimental to the efficient operation and administration of the schools of the district." 391 U.S. at 564. The Supreme Court ruled that absent a clear showing that Pickering's letter had, in fact, interfered with the normal operation of the school, his expression of opinion, even if erroneous, was protected by the First Amendment. Plaintiff stands on at least as firm footing as the teacher in Pickering. Whether or not defendants agreed with plaintiff's choice of Board member candidates cannot constitute a ground for his discharge. As Judge Kaufman put it in James v. Board of Education, supra at 573:

> More than a decade of Supreme Court precedent leaves no doubt that we cannot countenance school authorities arbitrarily censoring a teacher's speech merely because they do not agree with the teacher's political philosophies or leanings. This is particularly so when that speech does not interfere in any way with the teacher's obligations to teach, is not coercive and does not arbitrarily inculcate doctrinaire views in the minds of the students.

This Circuit, in Stolberg, supra, adjudicated the rights of a teacher at a state university who did not have his contract

renewed because he exercised his First Amendment freedom of speech and association by, among other things, criticism of the President of the University. In brushing aside defendants' justifications as makeweights, the lower Court found and this Court reiterated (per Mansfield, J.) at page 488:

> ...the real reason for not renewing Stolberg's teaching contract was his previous exercise of his First Amendment rights, a constitutionally impermissible basis for dismissal.

In Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. denied 385 U.S. 1003 (1967) defendants attempted to dismiss plaintiff for minor infractions. In fact, defendants refused to renew her contract of employment because of her participation in civil rights activity as well as voting registration activity in elections in which both her husband and father were candidates. In addition to holding that plaintiff could not be forced to choose between her constitutional rights and equal employment opportunity, the Court observed at page 182:

> We take it to be self-evident that the objections held either by the Board or the Principal to the plaintiff's exercise of her personal associational liberty to express her feelings about segregation would not justify refusal to renew her contract so long as these activities did not interfere with her performance of her school work.

See Rackley v. School District Number 5, 258 F.Supp. 676, 684 (D.S.C. 1966); Williams v. Sumter School District Number 2, 255

F.Supp. 397, 403 (D.S.C. 1966) (Both involving free speech and assembly in connection with civil rights activity for which plaintiffs' contracts to teach were not renewed). Similarly, plaintiff's right to express himself regarding the school board elections cannot justify his dismissal.

McGee v. Richmond Unified School District, 306 F.Supp. 1052 (N.D. Cal. 1969) presents facts similar to the instant case. There, plaintiffs, who were school community workers, were the victims of a school board election in which a change in control of the board occurred. Upon entering office the new board members immediately set about to strip the superintendent of his supervisory powers and to reverse a major integration plan for the City of Richmond. The new board also vigorously supported a tax increase which plaintiffs actively opposed in the tax election. Thereafter, plaintiffs were informed that they would not be rehired. The Court found that plaintiff's election activity formed the basis for their not being rehired. Citing Keyishian v. Board of Regents, 385 U.S. 589 (1967) and Pickering v. Board of Education, supra, the Court held that public participation in the election was a protected First Amendment activity and that defendants' refusal to rehire even non-tenured personnel for such activity offended the Constitution.

That defendants seek to punish plaintiff for speech, expression and association in respect to an election for school board members compounds defendant's constitutional infractions. It is beyond cavil that "the right to band together for the advancement of political beliefs" falls within the ambit of First Amendment

freedoms. Hadnott v. Amos, 394 U.S. 358 (1969); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958); see also, Williams v. Rhodes, 393 U.S. 23 (1968).

The clearly unconstitutional specifications contained in the charges against plaintiff infect all other specifications which are a mere pretext for penalizing plaintiff for his exercise of fundamental rights. Indeed, whether or not political retaliation forms all or part of the motive for purging plaintiff is of no moment since any permissible charge cannot be separated from those which are impermissible. See Simard v. Board of Education of Town of Groton, supra at 995; see also, National Labor Relations Board v. Jamestown Sterling Corp., 211 F.2d 725 (2d Cir. 1954). In Roth v. Board of Regents, 310 F.Supp. 972, 982 (W.D. Wis. 1970), aff'd. 446 F.2d 806 (7th Cir. 1971), rev'd. on other grounds, 408 U.S. 564 (1972), the Court pointed out at page 982:

> But a decision based in part on protected activity and in part upon unprotected activity is not a valid decision.

See Lewis v. Spencer, 468 F.2d 553, 557 - 558 (5th Cir. 1972).

The lower court erred in not affording plaintiff the opportunity to present his First Amendment claims and in not ruling that, on their face, the charges were violative of plaintiff's constitutional rights.

POINT IV

THE DISTRICT COURT ERRED IN HOLDING THAT EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED HEREIN

The Supreme Court of the United States has consistently rejected the application of the doctrine of exhaustion of state administrative remedies to causes alleging, as here, violations of 42 U.S.C. §1983. Gibson v. Berryhill, supra; Carter v. Stanton, 405 U.S. 669 (1972); King v. Smith, 392 U.S. 309 (1968); Houghton v. Shafer, 392 U.S. 639 (1968); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963). See Steffel v. Thompson, 415 U.S. 452, 472-473 (1974). In Gibson v. Berryhill, supra at 574 the Supreme Court held:

> [T]his Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. §1983.

In Houghton v. Shafer, supra at 640-641 a prisoner filed an action in federal court claiming that prison authorities had violated his rights under 42 U.S.C. §1983. The district court dismissed the complaint on the ground that petitioner had not alleged exhaustion of state administrative remedies. The Court of Appeals affirmed. In reversing, the Supreme Court described the administrative process as a "futile act", but held that, "In any event, resort to these remedies is unnecessary in light of our decisions in Monroe v. Pape, 365 U.S. 167, 180-183; 5 L.Ed. 2d 492, 81 S.Ct. 473; McNeese v. Board of Education, 373 U.S. 668, 671, 10 L.Ed. 2d 622, 624, 83 S.Ct. 1433; and Damico v. California, 389 U.S. 416, 19 L.Ed. 2d 647, 88 S.Ct. 526." More

recently, in Wilwording v. Swenson, 404 U.S. 249, 252 (1972), the Court relied on Houghton and again declared that the futility of the administrative process is not a ~~pre~~condition to permitting a federal plaintiff to by-pass that process in order to prosecute his claims under 42 U.S.C. §1983 in a federal court. In describing Houghton, the Court in Wilwording said:

> Although the probable futility of such administrative appeals was noted, we held that in any event, resort to these remedies is unnecessary. [25]

However, in 1969 this Circuit, in Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969) cert. denied, 400 U.S. 841 (1970), determined that a federal plaintiff could by-pass state administrative remedies:

> where the administrative remedy is inadequate...or where it is certainly or probably futile...

It is doubtful that the futility standard in Eisen is still an accurate reading of the pronouncements of the Supreme Court, in light of Supreme Court decisions subsequent to Eisen and cited supra. Recently, in Plano v. Baker, 504 F.2d 595, 597 (2d Cir. 1974), this Court determined that in the appropriate case, "this

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25. See Hawkins v. Town of Shaw, Mississippi, 461 F.2d 1171 (5th Cir. 1972); Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); McClelland v. Sigler, 456 F.2d 1266 (8th Cir. 1972); Stradley v. Anderson, 456 F.2d 1063 (8th Cir. 1972); Hillen v. Director of Dept. of Social Service and Housing, 455 F.2d 510 (9th Cir. 1972); Note, State Remedies Under the Civil Rights Act, 68 Colum.L.Rev. 1201, 1206 (1968).

Circuit's exhaustion rule should be subject to re-examination..." The application of the exhaustion doctrine to this case would require plaintiff to remain in his state of limbo. And, assuming an administrative hearing could be conjured into existence, to require plaintiff to participate would result in precisely the "wooden application" of the exhaustion doctrine which this Court condemned in Eisen. To hold otherwise not only ignores the undisputed facts but requires, under Plano, a re-examination of Eisen.

The Inadequacy and Futility of the Process

The administrative process which Judge Stewart has ruled plaintiff must exhaust is not only inadequate and futile, it is inoperative. By declining to prosecute the charges against plaintiff, defendants have brought the administrative process to a halt almost three months ago. In reality, no administrative process exists; only a set of charges and a suspension. Moreover, that there are five defendants appealing Judge Stewart's April 3 Order, claiming they wish to reinstate plaintiff and drop the charges, is the clearest indication that to require plaintiff to go through an administrative hearing, with the cost and time required, is a futile act. Judge Stewart erred in attempting to order this futile process to proceed in the name of securing plaintiff's right to a hearing. Such a ruling ignored the undisputed facts before the lower Court regarding defendants' unwillingness to prosecute plaintiff, the desire of a majority to reinstate him, but their inability to do so because of the absence of

defendant Ramos. Plaintiff's suspension should have been lifted, and the charges dismissed to rectify what Judge Stewart should have found to be a due process violation. Clearly, these facts presented sufficient futility and inadequacies to permit plaintiff to proceed to litigate his First Amendment claims.

Judge Stewart further erred by failing to find the process futile and inadequate in light of the bias and prejudgment of at least two defendants. See pp. 31 - 50 supra. In Gibson v. Berryhill, supra, the Supreme Court found in a case alleging bias and prejudgment, that when the constitutional violations relate to the administrative process, itself, exhaustion of that process is not required. Id. at 574-575.

> In the instant case the matter of exhaustion of administrative remedies need not detain us long. Normally when a state has instituted administrative proceedings against an individual who then seeks a injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated, at least where coverage or liability is contested and administrative expertise, discretion, or factfinding is involved. But this Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. §1983. McNeese v. Board of Education, 373 U.S. 668, 10 L.Ed. 2d 622, 83 S.Ct. 1433 (1963); Damico v. California, 389 U.S. 416, 19 L.Ed. 2d 647, 88 S.Ct. 526 (1967). Whether this is invariably the case even where, as here, a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, is a

> question we need not now decide; for the clear purport of appellees' complaint was that the State Board of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion. Thus, the question of the adequacy of the administrative remedy, an issue which under federal law the District was required to decide, was for all practical purposes identical with the merits of appellees lawsuit.

This Court stated in Finnerty v. Cowen, 508 F.2d 979, (2nd Cir. 1974):

> In any event, we agree with other recent opinions dispensing with the exhaustion requirement in situations where the very administrative procedure under attack is the one which the agency says must be exhausted. Id. at 982-983. [Citations omitted].

Here, as in Gibson, plaintiff attacked the composition and procedure of the process which a faction of the Board and the District Court, together, will have him exhaust.

Moreover, by denying plaintiff the opportunity to litigate his First Amendment claim in the Federal Court, the District Court deprived him of the only forum in which that claim can be adjudicated. The defendants' administrative process cannot determine plaintiff's constitutional claims. In Finnerty v.

Cowen, 508 F.2d 979 (2d Cir. 1974), a very recent case, this Court, in reversing the district court's dismissal of a social security and railroad retirement claimant because of failure to exhaust administrative remedies, stated that:

> Federal agencies like the [Railroad Retirement] Board "have neither the power nor the competence to pass on the Constitutionality of administrative or legislative action" Id. at 982. [Citations omitted.]

Plaintiff alleges serious violations of his First and Fourteenth Amendment rights. In Plano v. Baker, supra this court reversed the district court's decision to dismiss a plaintiff's complaint and to relegate him to the administrative process. As one of its reasons for so doing, this Court pointed out that the administrative process in Plano was inadequate because "the constitutional issues raised by this case, particularly in the First Amendment area, lie within the expertise of courts, not the expertise of administrators". Id. at 599. As this Court put it in Escalera v. New York City Housing Authority, 425 F.2d 853, 865 (2d Cir. 1970), "Federal Courts...are the primary forum for vindicating federal rights".

POINT V

THE DISTRICT COURT ERRED IN FAILING TO ISSUE AN INJUNCTION

The District Court's determination that no irreparable injury was shown to merit a preliminary injunction, rests on its erroneous finding that the administrative process is both constitutional and adequate. (See March 18, Opinion pp. 13, 15). As the facts of this case indicate, the administrative process is dysfunctional. To require plaintiff to remain suspended and accused without a workable administrative process is irreparable harm. Moreover, as the District Court seemed to imply, and as the Supreme Court in Gibson v. Berryhill, supra ruled, a finding of unlawful bias and prejudgment is sufficient to warrant an injunction against the prosecution of charges before the unconstitutionally composed administrative tribunal has had an opportunity to render its verdict. Thus, the blatant admissions of bias and prejudgment on the parts of defendants Roher and Price, coupled with the absence of any viable administrative process whatsoever demonstrates ample irreparable injury.

Sampson v. Murray, 415 U.S. 61 (1974) is inapposite and Judge Stewart's reliance on that case was misplaced. The dismissal of a probationary government employee, with no property rights, for her unwillingness to accept direction from her supervisors, is far different from the suspension and possible

dismissal of plaintiff who has property and liberty rights to a due process hearing. In Sampson, the probationary employee, whose due process rights were not as comprehensive as plaintiff's was at least presented with an operative administrative process. Plaintiff has none. Additionally, Sampson did not involve allegations of violations of constitutional rights. There, the employee was merely challenging an agency's non-compliance with its own procedures which could be rectified internally. As pointed out supra at 61, the determination of constitutional violations falls within the province of the federal courts and not a local educational agency certain of whose members are alleged to be committing those very constitutional violations. It is elemental that once a court finds a constitutional deprivation irreparable injury exists and the court must issue an appropriate order to insure that such unlawful conduct is stopped. Gibson v. Berryhill, supra.

POINT VI

THE DISTRICT COURT ERRED BY DISMISSING PLAINTIFF'S DEFAMATION AND CONTRACT CLAIMS

The lower Court ruled that since it dismissed the federal claims it was appropriate to dismiss plaintiff's state claims for defamation and breach of contract. Since the lower Court erred in its dismissal of the constitutional claims, the basis for dismissing the state claims evaporates.

Moreover, since jurisdiction of this case is grounded, in part, on diversity jurisdiction pursuant to 28 U.S.C. §1332 the lower Court erred in dismissing the state claims under the theory of United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Plaintiff has a right to proceed in federal court with his state claims under section 1332 even if no federally based claims were made.

CONCLUSION

Plaintiff urges this Court to reverse the decision of the District Court and to order that the charges against him be dismissed, his suspension terminated, and the acts of the principal defendants be declared in violation of the First and Fourteenth Amendments. Plaintiff further urges that his contract and defamation claims be remanded for further proceedings.

Dated: New York, New York
April 18, 1975

Respectfully submitted,

JACK JOHN OLIVERO
HERBERT TEITELBAUM
KENNETH KIMERLING
RICHARD J. HILLER
PUERTO RICAN LEGAL DEFENSE
& EDUCATION FUND, INC.
95 MADISON AVENUE
NEW YORK, NEW YORK 10016
212-532-8470

ATTORNEYS FOR PLAINTIFF-APPELLANT

APPENDIX

NEW YORK STATE EDUCATION LAW

SECTION 2590-j(7)

Each community board shall, subject to the provisions of paragraph (e) herein, have authority and responsibility with regard to trials of charges against any members of the teaching or supervisory service staffs of the schools within its jurisdiction as follows:

(a) No such employee who has served the full and appropriate probationary period prescribed by, or in accordance with law, shall be found guilty of any charges except after a hearing and by the affirmative vote of a majority of all the members of the community board. The community board shall have the right to impose a penalty on an employee, consisting of a reprimand, a fine. suspension for a fixed time without pay, or dismissal, or transfer within the district or any one or more of them.

(b) Charges may be initiated by the community superintendent against any such employee for any of the following offenses:

(1) Unauthorized absence from duty or excessive lateness;

(2) Neglect of duty;

(3) Conduct unbecoming his position, or conduct prejudicial to the good order, efficiency or discipline of the service;

(4) Incompetent or inefficient service;

(5) A violation of the by-laws, rules or regulations of the city board, chancellor, or the community board; or

(6) Any substantial cause that renders the employee unfit to perform his obligations properly to the service.

(c) The community superintendent, in advance of the filing of charges and specifications, shall inform the employee accused and the community board of the nature of the complaint.

No charges shall be brought more than six months after the occurrence of, the discovery thereof, or the date when discovery should have occurred upon the exercise of the diligence, of the alleged incompetency or misconduct except where the charge is of misconduct constituting a crime when committed.

(d) The employee charged shall be given an opportunity to be heard, in person or by counsel, including the right to receive a copy of the charges and specifications, and shall be entitled to cross-examine opposing witnesses and to call and examine witnesses in his own behalf.

(e) Upon the service of a copy of the charges upon such employee and the filing thereof with the community board, the community superintendent may recommend to the chancellor the suspension of any such employee. If the chancellor shall determine that the nature of the charge requires the immediate removal of the employee from his assigned duties, he may suspend such employee for a period not exceeding ninety days pending hearing and determination of charges, provided however, that such employee shall be entitled to receive full compensation during the period of suspension. In case the employee is acquitted, he shall be restored to his position.

(f) The community board on receipt of a notice of charges by the community superintendent against any employee shall appoint one or more trial examiners. The assigned trial examiner or examiners shall be selected from a panel of competenet persons maintained by the chancellor. The trial examiner shall administer the oath to all appropriate witnesses. A trial examiner shall have the power to subpoena witnesses, papers and records. The provisions of the civil practice law and rules in relation to enforcing obedience to a subpoena lawfully issued by a judge, arbitrator, referee or other person in a matter not arising in an action in a court of record apply to a subpoena issued by a trial examiner as authorized by this subdivision. The report of any such trial examiner shall be subject to final action by the community board. The community board may reject, confirm or modify the report of the trial examiner or examiners. A vote of the majority of all members of the board shall be necessary for a finding of guilt and to impose a penalty or punishment. The employee may appeal to the city board from any adverse determination or

penalty imposed by such community board. The city board after reviewing the record in the case, shall have the power to make a final determination in the case subject to any provision for arbitration that may exist in agreements between the city board and the organization representing such employee, not inconsistent with applicable law. Nothing contained in this section shall preclude an aggrieved employee from seeking a review of such final determination by the commissioner or the courts as prescribed by law.

CERTIFICATE OF SERVICE

I, HERBERT TEITELBAUM, an attorney for plaintiff-appellant, hereby certify that two copies of the attached brief of plaintiff-appellant were mailed to each of the following parties, by placing said copies in envelopes which were then properly stamped and addressed and deposited in a U.S. mail box this 18th day of April, 1975.

W. Bernard Richland
Corporation Counsel
Municipal Building
New York, New York 10007

Arnold Rothbaum, Esq.
Williamsburg Legal Services
260 Broadway
Brooklyn, New York

Carolyn Kozlowsky, pro se
155 East 4th Street
New York, New York

Herbert Teitelbaum
HERBERT TEITELBAUM